Supreme Court, U.S.
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No. 96-1256

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

Yuri Kraytsberg, Pro Se and
Yuri Kraytsberg, as Next Friend of Anna Kraytsberg,
Minor - Petitioners
vs.
Commonwealth of Massachusetts - Respondent

ON PETITION FOR WRIT OF SERTIORARY TO MASSACHUSETTS APEALS COURT

SUPPLEMENTAL APPENDIX
(Appendix B - Findings of Fact)

Yuri Kraytsberg
42 Madison Ave.
Sharon, MA 02067
(617) 784-8353

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX DIVISION PROBATE & FAMILY COURT
NO. 91DIO93-DI

Yergenya Kraytsberg
v.
Yury Kraytsberg

FINDINGS OF FACT ON COMPLAINT FOR MODIFICATION (filed January 26, 1994)

A. PROCEDURAL HISTORY:

1. The plaintiff, Yevgenya Kraytsberg, and the defendant, Yury Kraytsberg, were divorced by a Judgment of Divorce Nisi of this Court (Ginsburg, J.) dated February 16, 1993.

2. The plaintiff filed a Complaint for Modification on January 26, 1994 in the Middlesex Probate and Family Court (Docket NO. 9IDIO93-DI). The defendant has not filed an answer.

3. The plaintiff's Complaint for Modification seeks a termination of visitation between the defendant and the minor child, Anna Kraytsberg.

4. The court entered the following temporary orders:

a) On January 26, 1994 an order was entered which provided that pending a hearing on the merits, visitation between the defendant and the minor child was to be supervised under the terms and conditions determined by the attorney for the child. Pursuant to the order a review was scheduled for February 23, 1994.

b) The Recommendations of the Attorney for the Child Regarding Visitation dated January 26, 1994, which were adopted and approved by the court, provided the following:

"1. Pending the further order of the court all visitation shall be supervised by a supervisor to be selected by the attorney for the child.

2. Visitation between Anna and her father shall take place one (1) day per week for a period of up to two (2) hours for each

weekly visitation.

3. The cost, if any, for supervision shall be borne by the defendant.

4. The attorney for the child shall notify both the plaintiff and the defendant by letter, no later than January 31, 1994 of the name of the supervisor and telephone number of the supervisor and the place for visitation. Unless a different schedule is necessary visitation shall occur on: Saturday, February 5, 1994 from 9:00 a.m. to 11:00 a.m.; Saturday, February 12, 1994 from 9:00 a.m. to 11:00 a.m.; Saturday, February 19, 1994 from 9:00 a.m. to 11:00 a.m. If Mr. Kraytsberg is unable to appear for a scheduled visitation he shall contact the supervisor no later than 7:00 p.m. on the evening before. Mrs. Kraytsberg shall be responsible for dropping off and picking up Anna for visitation.

5. During the visitation, the defendant shall be prohibited from discussing with Anna any issues concerning the litigation, the terms of visitation and/or personal issues between himself and the plaintiff.

6. Pending the further order of the court there shall be no telephonic communication between the defendant and Anna."

c) On January 28, 1994 the attorney for the child notified the parties and the attorney for the plaintiff by letter that the supervisor for visitation would be Ms. Nancy Knyff. Visitation was to occur at the McDonald's Restaurant in Norwood, MA. The cost for the supervisor would be twenty-five ($25.00) dollars per hour.

d) On February 18, 1994 by letter Ms. Knyff notified the attorney for the plaintiff and the attorney for the child that none of the scheduled visitations occurred at the request of the defendant.

e) On February 23, 1994 a Temporary Order was entered providing that all visitation by the defendant be terminated pending a hearing on the merits, and that the attorney's fees for the attorney for the child in the amount of one thousand five hundred and eighty-six ($1,586.00) dollars be paid forthwith.

f) On March 21, 1994 the attorney for the child filed a Complaint for Contempt for the failure of defendant to pay the counsel fees. The complaint was returnable before the court for hearing on April 22, 1994, the date originally scheduled for trial on

the merits of the Complaint for Modification. Upon the motion of the attorney for the child, both the Complaint for Modification and the Complaint for Contempt were continued for hearing to July 19, 1994.

g) On June 29, 1994 the defendant's counsel filed a Motion to Withdraw his appearance, which was denied by the court (Ginsburg, J.)

h) On July 19, 1994 the attorney for the child filed a Motion to Compel Payment of Attorney's Fees.

B. BASIC FACTUAL INFORMATION:

5. The plaintiff and the defendant were married at Moscow, Russia on November 26, 1986. There is one (1) child born of the marriage: Anna Kraytsberg, born March 12, 1987, age seven (7).

6. The plaintiff is not remarried. The plaintiff and the minor child, Anna, reside at 16 Warren Terrace, Newton Centre, MA.

7. The defendant is not remarried. The defendant and his significant other, Renata Kuchinsky, reside at 42 Madison Avenue, Sharon, MA. Ms. Kuchinsky's fifteen (15) year old son and her mother reside in the same household.

8. The Judgment of Divorce Nisi of this Court (Ginsburg, J.) dated February 16, 1993 provides in pertinent part for the following:

> "1. The [Mother] shall have the sole legal and physical custody of Anna Kraytsberg, their minor child.
>
> 2. The [Father] shall be entitled to have the minor child with him every other weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m. If a Monday holiday follows Father's weekend, he shall be entitled to have the minor child with him until Monday at 4:00 p.m. If minor child is enrolled in a class or activity, Father shall take her during the weekends she is with him.
>
> 3. On the weekend that Father does not have the child with him, he shall be entitled to have the child with him from 6:00 p.m. on Thursday until Friday morning when the Father shall deliver the child to residence of the Mother by 10:00 a.m. on Friday.
>
> 4. The Father shall have the minor child with him during the following holiday and vacation times:

(a) Every other Thanksgiving from Thursday morning at 9:00 a.m. until Sunday evening at 6:00 p.m. If the weekend following Thanksgiving is not Father's weekend, he shall return the child to Mother's home Saturday at 9:00 a.m.
(b) The first half of the Christmas vacation. The days of said vacation shall constitute the day after school ends until the day before school begins, inclusive. The Father shall have the child with him from 9:00 a.m. the day after school ends until 4:00 p.m. of the day midday through said holiday.
(c) Every February school vacation week from Saturday at 9:00 a.m. until Sunday at 6:00 p.m.; however, if Father's usual weekend falls at the beginning for the week of vacation, he shall return the child to the Mother on-Saturday at 9:00 a.m. if Father's usual weekend falls at the end of the week of vacation, he shall pick the child up at 6:00 p.m. on Sunday and return her the following Sunday at 6:00 p.m.
(d) Two (2) weeks not consecutive between the end of school and August 1. The same provisions regarding building the week into regular visitation schedule applies as outlined in subparagraph (c) above.
The Father shall notify the Mother of the weeks he chooses on or before April Ist of each year.

5. The Mother shall have the child with her for vacation for the entire month of August and the Father shall have no visitation rights during this period.

6. Neither party shall remove the minor child from the Commonwealth of Massachusetts except by written agreement or order of the court pursuant to Mass. General Laws c. 208, §30.

7. If the child becomes ill during her visit with the Father she shall be returned immediately to the Mother or to her parents.

8. Any and all medical information about the child shall be shared with the other parent in reliable form but without using the child as a messenger. The parent who first has the information shall send a message in some form, with whatever speed the situation requires. Telephone communications should only be issued if there is an emergency. Neither parent shall keep the name of any health provider from the other parent.

9.When the child is with either party, the other party shall be entitled to call on the telephone once between the hours of 9:00

a.m. and 7:00 p.m. Neither party shall call after 7:00 p.m.

10. For any of the child's visits with the Father which exceed three (3) days the Father shall provide to the Mother the exact place where the child shall be, including who will be with them, and the address and telephone numbers where she will be staying.

11. Absent emergency, there shall be no oral, in person communication between the parents. All communication specifically about the child shall be in written form or by telephone only if there is an emergency.

12. The Father shall be solely responsible for the child's transportation from and to the Mother's home for all visitations. The Mother will have the child ready at the scheduled time. Under no circumstances whatsoever shall the Father enter the mother's home for any reason."

9. The minor child, Anna, currently resides with the plaintiff at 16 Warren Terrace, Newton Center, MA.

C. PRESENT AND FUTURE NEEDS OF THE MINOR CHILD:

10. The minor child of the parties, Anna Kraytsberg, was born on March 12, 1987 and is seven (7) years of age.

11. The minor child currently resides with the plaintiff at 16 Warren Terrace, Newton Centre, MA. The minor child has resided continuously with the plaintiff since the parties' separation prior to the Judgment of Divorce Nisi.

12. The minor child attends school at the Bowen School, 280 Cypress Street, Newton Centre, MA. In September, 1994 she will be entering the second grade.

13. The child's general performance in school is excellent. Her classroom teacher portrays Anna as having successfully achieved the academic requirements for grade one. The child, however, exhibited some behavioral problems around the holiday vacation at midyear, described as difficulty with transitions, baby talk and whining. The behaviors described by the teacher ceased in February, but became apparent around Father's Day and then abated.

14. The general health of the child is good. She does not now receive any extraordinary treatment. During the divorce and up through July, 1993 the child was seen by a therapist, Ellen Gordon,

then of Jewish Family and Children's Services. Ms. Gordon recommended cessation of counselling in July, 1993. The child's behavior during this period up through February, 1994 was marked by frequent bed wetting, baby talk, behavioral difficulties. Since February, 1994 the minor child has been described as free from these manifestations. The minor child is not currently treated by any other counsellor or therapist.

15. An attorney for the child was appointed by the Court (Ginsburg, J.) prior to the trial on the merits of the Complaint for Divorce. The child has expressed a meaningful preference on the issue of visitation with the defendant. The child does not wish to be further drawn into the confrontation between her parents, and does not wish to be reminded about restraining orders, police intervention, jail sentences, or other threats by the defendant.

16. The present parenting arrangement has accommodated the child and addressed her best interests by continuing sole legal and physical custody with the plaintiff.

17. Under the terms of the Judgment of Divorce Nisi of this court dated February 16, 1993, Dr. Kenneth D. Herman was to remain as Guardian ad Litem with respect to any issues regarding the minor child. "If he is unable to resolve the issue, he shall notify the attorney for the child who shall bring the matter before the court on appropriate notice to all concerned." There has been no continuing involvement of the Guardian ad Litem in this matter. Dr. Herman ceased to serve as Guardian ad Litem. The attorney for the child filed a Motion to Refer to Guardian ad Litem for Further Investigation on June 9, 1993. The motion was deferred by the court (Ginsburg, J.).

18. The defendant has found it difficult, if not impossible, to cooperate with people in this case who do not agree with him. He alienated Dr. Herman, one of the most experienced and respected Guardian ad Litems to the point where Dr. Herman refused to deal with the defendant any longer. The defendant has had numerous attorneys and his relationship with them has been unusual, to say the least. Sometime he claims to be operating pro se, sometimes he claims to have no lawyer and sometimes he works with them on a parallel track. He would not cooperate with the attorney for the child

who was attempting to establish a mechanism to facilitate a reestablishment of contact with his daughter. He has been jailed twice by the court for contempt for failure to comply with support orders.

D. VISITATION:

19. The defendant has had lapses in visitation since the entry of the Judgment of Divorce Nisi on February 16, 1993. The defendant did not visit with Anna from February through May, 1993. He told the minor child that he was afraid to pick her up because of restraining orders and the possibility of jail. From June, 1993 to December 17, 1993 the defendant exercised his regular visitation. During this period of time the plaintiff observed the child having problems with bed wetting, restlessness, hair pulling, difficulty with concentration, and baby talk.

20. The defendant did not exercise visitation after December 17, 1993, although the terms of the judgment provided that he should be with the child during the first half of the holiday vacation period. After the entry of the temporary order on the Complaint for Modification which provided for supervised visitation, the defendant refused to exercise visitation because he did not like the parameters of the supervision.

21. In January, 1994 the plaintiff learned that the defendant had obtained a refugee travel document for the minor child. The defendant maintains that he applied for and obtained the document in the Spring, 1993 in order to visit friends in Canada. The defendant admits that a refugee travel document is unnecessary to visit Canada. In order to travel to Canada a resident alien must show a green card. The plaintiff has possession of the minor child's green card.

The plaintiff and the defendant have had a long and tortuous history with one another. The Newton Police Department have been involved with the parties during the divorce and since the entry of the Judgment of Divorce Nisi. The plaintiff has consulted with a detective in the domestic violence unit in April and May, 1993 and again in January, 1994. The Newton Police detective confirmed to the plaintiff that the defendant had obtained the refugee travel document for the minor child. The detective told the plaintiff that

there would be no way to stop the defendant from removing the child from the Commonwealth of Massachusetts while he had these documents.

23. The defendant has been vague and confusing in his testimony regarding the purpose of obtaining travel documents for the minor child. The defendant did not consult with the plaintiff in advance of obtaining the document, nor did he notify her that he obtained the documents. Given the history of lack of communication and threats between the parties, it is extremely difficult to rationalize the reason defendant procured the travel document.

24. Although the defendant is rooted in this area in that he has a job and owns a home here, the plaintiff was not unreasonable in her apprehension that the defendant intended to kidnap the child and leave the country. His past behavior and statements coupled with the steps taken by him in obtaining travel documents were consistent with his history of taking unilateral action which is not rational.

E. CHANGE OF CIRCUMSTANCE:

25. Since the entry of the Judgment of Divorce Nisi on February 16, 1994, there has been a material and substantial change in circumstances warranting a change in visitation arrangements to better meet the best interests of the minor child.

26. Although it would be in the child's best interest and meet her expressed preference if an arrangement for visitation could be worked out which would not have as part of the environment the unyielding hostility of the parents toward each other, such an arrangement is not possible at this time.

27. Termination of all visitation, at least for the time being, is in the best interests of the minor child.

F. DISCUSSION:

The relationship between the parents in this case has been poisonous since the inception of the divorce. The defendant is convinced that he has been treated unjustly and that the system is against him. The plaintiff believes that the defendant wants to get his way at any price and would, if provided with an opportunity, abduct the child and leave the country. Both parties' perception is distorted.

Caught between the unyielding hostility of the parents in a position which is intolerable is a six and one-half (6 1/2) year old girl. Despite several efforts, the system, including lawyers, judges, and mental health professionals, has been singularly unsuccessful in attempting to fashion a parenting plan which would afford both parents access to the child without exposing her to constant trauma.

This case is frustrating in that no satisfactory solution is available. The child should have access to both parents and the law should be able to develop a successful parenting plan. However, after a great deal of effort and much deliberation, the court comes to the reluctant conclusion that in the present circumstances there is no way to devise a workable parenting plan which provides access to the defendant. The plaintiff is clearly the primary parent most able to foster the constructive development of the child. Although the defendant sincerely wants to have a meaningful relationship with his daughter, he has been unable to control his impulses. Not only has he caused great anxiety to the plaintiff but even alienated a daughter by a previous marriage who has chosen to live in a foster home rather than remain with her father. In order to provide stability and tranquility for the child and to set the stage for the development of a meaningful relationship with the defendant in the long run the child, plaintiff and defendant need space at this time. The defendant probably recognizes the situation on a subconscious level. He has had no contact with the child since December 1993 and has failed to avail himself of the attempts by the attorney for the child to put into place a mechanism to reestablish a relationship.

It is with reluctance but with a sense of reality that the court is terminating all court ordered visitation between the defendant and child at this time. The court hopes that the plaintiff who has expressed an understanding of the significance of a father-daughter relationship will as time goes on reach out for a mechanism to foster a relationship of the daughter with the defendant.

By the Court,

July 25, 1994

Date

Edward M. Ginsburg,

Associate Justice